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Ketua Pengarah Hasil Dalam Negeri v Hock Lee Holdings Sdn Bhd

B HIGH COURT (KUCHING) — SUIT NO 14–3 OF 2006–I
DAVID WONG J
29 OCTOBER 2007

C *Revenue Law — Income Tax — Special Commissioners — Case stated — Approach of court in a case stated — Question of law — Whether could challenge finding of facts — Whether findings consistent with primary facts*

D *Revenue Law — Income Tax — Business income — Whether disposal of properties fall under business income from an adventure in the nature of trade — Whether respondent carrying a business of trade in respect of the lands — Whether was capital realization — Income Tax Act 1967 s 4(a)*

E

The respondent acquired several lands in 1975 and 1979. The lands were subsequently developed into residential houses and commercial and industrial shophouses by Hock Lee Construction Sdn Bhd, who is the F respondent's subsidiary company. From 1997–1999, the respondent disposed 94 units of properties under the said development. The gains from the disposal were treated by the appellant as business income from an adventure in the nature of trade and consequently taxed under s 4(a) of the Income Tax Act 1967. The respondent appealed to the Special Commissioners of Income G Tax (Special Commissioners) on the tax imposed. The Special Commissioners of Income Tax (Special Commissioners) handed down a decision on 2 August 2006, holding that the gains or the sale of the properties was a capital realization and not subject to income tax under Income Tax Act 1967. The appellant appeals against the said decision.

H

Held, dismissing the appeal with costs to be taxed:

(1) Firstly, whoever appeals against the decision of the Special I Commissioners bears the burden of proof to show that the same is wrong. Secondly, to discharge that burden the appellant must show that the decision of the Special Commissioners was a decision 'which no person properly instructed in the relevant law and acting judicially could have come to. Thirdly, the party challenging the Special

Commissioners' findings of fact must ask for the Case Stated to state a question whether a particular finding of fact is unjustified in view of the evidence adduced. Fourthly, findings of primary facts by the Special Commissioners cannot be questioned by the court as it does not sit as a review court of facts. The court's power is determine whether the conclusion reached by the Special Commissioners is consistent to the primary facts (see paras 3–6).

(2) Pursuant to para 34 schedule 5 of the Income Tax Act 1967, what is before the court can only be a question of law and that question is whether or not the findings of the Special Commissioners are consistent to the proved facts or what are known as 'primary facts' which in law cannot be questioned by this court unless challenged by the appellant in the Case Stated (see para 12).

(3) The Special Commissioners found as a primary fact that the acquisition of the lands were for the purpose of investment. That being the case, the conclusion of the disposal of the 94 houses as a capital disposal is perfectly in order and consistent with the primary fact. In reaching their conclusion, they had dealt with all the proved facts and applied the correct and established principles of law by referring to the relevant cases (see para 20(1) & (2)).

(4) The attack on the Special Commissioners' reliance on the unstable condition in the local and financial crisis for their conclusion is without merit. Firstly, if the appellant had wanted to challenge this reliance, they should have it as part of the Case Stated. Secondly, the fact that this consideration was not part of the facts proved is of no consequence. This court must assume that there had been evidence tendered before the Special Commissioners for them to state it as part of their reasons. The use of this consideration in reaching their conclusion equates to a finding of fact which this court is not in a position to revise. Thirdly, the sale of the 94 houses due to unfavorable economic condition merely corroborates the conclusion that the lands were acquired as an investment (see para 20(4)).

[Bahasa Malaysia summary

Responden telah memperoleh beberapa bidang tanah pada tahun 1975 dan 1979. Tanah-tanah tersebut kemudiannya telah dibangunkan menjadi rumah-rumah kediaman dan komersial dan rumah-rumah kedai perindustrian oleh Hock Lee Construction Sdn Bhd, yang merupakan anak syarikat responden. Daripada tahun 1997–1999, responden telah menjual 94 unit hartanah di bawah pembangunan tersebut. Hasil keuntungan daripada penjualan tersebut telah diumpamakan oleh perayu sebagai pendapatan perniagaan daripada cabaran membuat perniagaan dan oleh yang

demikian layak dikenakan cukai di bawah s 4(a) Akta Cukai Pendapatan 1967. Responden merayu kepada Pesuruhjaya Khas Cukai Pendapatan (Pesuruhjaya Khas) ke atas cukai yang telah dikenakan. Pesuruhjaya Khas Cukai Pendapatan telah membuat keputusan pada 2 Ogos 2006, yang berpendapat bahawa keuntungan-keuntungan atau penjualan hartanah-hartanah adalah merupakan satu realisasi modal dan tidak tertakluk kepada cukai pendapatan di bawah Akta Cukai Pendapatan 1967. Perayu merayu terhadap keputusan tersebut.

Diputuskan, rayuan ditolak dengan kos untuk ditaksirkan:

(1) Pertama, barangsiapa yang merayu terhadap keputusan Pesuruhjaya Khas mempunyai bebanan pembuktikan bagi menunjukkan bahawa yang sama adalah salah. Kedua, bagi melepaskan beban perayu mesti menunjukkan bahawa keputusan Pesuruhjaya Khas adalah satu keputusan 'yang mana tiada seseorang yang telah menerima arahan yang sewajarnya dalam perundangan relevan dan bertindak seadilnya akan berbuat sedemikian'. Ketiga, pihak yang mencabar dapatan fakta Pesuruhjaya Khas hendaklah menanyakan untuk Kes Yang telah Dinyatakan bagi menyatakan persoalan sama ada sesuatu penemuan fakta adalah tidak mempunyai justifikasi dari pandangan keterangan yang telah dikemukakan. Keempat, penemuan-penemuan fakta utama oleh Pesuruhjaya Khas tidak boleh dipersoalkan oleh mahkamah memandangkan ia tidak bertindak sebagai kajian semula mahkamah kepada fakta-fakta. Kuasa mahkamah adalah menentukan sama ada kesimpulan yang dicapai oleh Pesuruhjaya Khas adalah selari dengan fakta-fakta utama (lihat perenggan 3–6).

(2) Menurut kepada perenggan 34 Jadual 5 Akta Cukai Pendapatan 1967, apa yang ada di hadapan mahkamah hanya persoalan perundangan dan persoalan itu adalah sama ada penemuan-penemuan Pesuruhjaya Khas adalah selari kepada fakta-fakta yang telah dibuktikan atau apa yang dikenali sebagai 'fakta-fakta utama' yang dalam perundangan tidak boleh dipersoalkan oleh mahkamah ini melainkan dicabar oleh perayu dalam Kes yang Dinyatakan (lihat perenggan 12).

(3) Pesuruhjaya Khas telah mendapati sebagai fakta utama bahawa pemerolehan tanah-tanah adalah bagi tujuan pelaburan. Oleh sebab itu, kesimpulan penjualan 94 buah rumah sebagai pelupusan modal adalah sangat teratur dan selari dengan fakta utama. Semasa membuat kesimpulan, mereka telah membincangkan kesemua fakta-fakta yang telah dibuktikan dan mengguna pakai prinsip-prinsip perundangan yang betul dan sedia ada dengan merujuk kepada kes-kes yang relevan (lihat perenggan 20(1) & (2)).

(4) Kritikan pada Pesuruhjaya Khas ke atas kebergantungan syarat-syarat yang tidak stabil dalam krisis tempatan dan kewangan untuk kesimpulannya adalah tanpa merit. Pertama, jika perayu mahu mencabar kebergantungan ini, mereka sepatutnya menjadikan sebahagian daripada Kes yang Dinyatakan. Kedua, fakta bahawa pertimbangan ini bukan sebahagian daripada fakta-fakta yang dibuktikan adalah tidak mempunyai apa-apa kesan. Mahkamah ini mesti mengandaikan bahawa terdapat keterangan yang dikemukakan di hadapan Pesuruhjaya Khas bagi mereka menyatakannya sebagai sebahagian daripada sebab-sebab mereka. Penggunaan pertimbangan ini dalam mencapai kesimpulan mereka menyamakan kepada penemuan fakta yang mana mahkamah ini tidak mempunyai kedudukan untuk menyemaknya. Ketiga, penjualan 94 buah rumah kerana keadaan ekonomi yang tidak menyebelahi mereka hanya menyokong kesimpulan bahawa tanah-tanah telah diperolehi sebagai satu pelaburan (lihat perenggan 20(4)).]

Notes

For cases on business income, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2103-2104.

For cases on Special Commissioners, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2300-2301.

Cases referred to

Chu Lip Kong v Director-General of Inland Revenue [1978] 2 MLJ 197 (refd)

Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue [1986] 2 MLJ 161 (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713 (refd)

Mount Pleasure Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 1 MLJ 168 (refd)

Simmons v IRC [1980] 1 WLR 1186 (refd)

Legislation referred to

Income Tax Act 1967 s 4(a)

Hazlina Hussain (Senior Revenue Counsel, Inland Revenue Board Malaysia) for the appellant.

Chew Peng Hui for the respondent.

David Wong J:

[1] The relevant facts are briefly and accurately summarized by the learned counsel for the appellant and for convenience I reproduce the same here:

(1) The respondent acquired nine parcels of land in 1975 and 1979 ('lands').

(2) In 1983, the respondent and a few other land owners signed an agreement with Hock Lee Construction Sdn Bhd ('HLC') to develop the land into residential houses and, commercial and industrial shophouses. HLC is the respondent's subsidiary company (wholly owned in 1994).

(3) In 1994, the respondent together with other land owners and HLC entered into a supplementary agreement for the allocation of units under the proposed development.

(4) In 1997 to 1999, the respondent disposed 85 units back to HLC and nine units to other buyers.

(5) The gains from the disposals were treated by the appellant as business income from an adventure in the nature of trade and consequently taxed under s 4(a) of the ITA.

(6) The assessment raised on the respondent related to the years of assessment 1996, 1997, 1998, 2000 (preceding year basis) and 2000 (current year basis), particulars are as follows:

Year of Assessment	Type of Assessment	Date of Assessment	Tax Payable (RM)
1996	Additional	12 November 2003	360,670.80
1997	Additional	12 November 2003	1,402,771.3
1998	Additional	12 November 2003	172,023.60
2000 (Preceding Year)	Additional	12 November 2003	1,264,393.76
2000 (Current Year)	Additional	12 November 2003	108,197.60

APPROACH OF THE COURT IN A CASE STATED

[2] In dealing with this appeal, I am guided by certain established principles and they are as stated by Raus Sharif J (as he then was and sitting then in the Court of Appeal) in *Mount Pleasure Corp Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 1 MLJ 168:

> The duty of the court when hearing a tax appeal is well laid down by Lord Diplock in Chua Lip Kong v DGIR [1982] 1 MLJ 235 where his Lordship stated:
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> > Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself... From the primary facts admitted or proved the Commissioners are entitled to

draw inferences, such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of facts.

Chua Lip Kong's case was followed by the Supreme Court in *Lower Perak Co-Operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713, where the Supreme Court had referred to the much quoted principles enunciated by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14; [1955] 3 All ER 48. Lord Radcliffe said as follows:

> I think that the true position of the court in all these cases can be shortly stated. *If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination*. I do not think that inferences drawn from other facts are incapable of being themselves findings of facts, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination *or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur*. (Emphasis added.)

From the above the following principles of law can be distilled.

[3] Firstly, whoever appeals against the decision of the Special Commissioners bears the burden of proof to show that the same is wrong.

[4] Secondly, to discharge that burden the appellant must show that the decision of the Special Commissioners was a decision 'which no person properly instructed in the relevant law and acting judicially could have come to' (see *Edward v Bairstow*).

[5] Thirdly, the party challenging the Special Commissioners' findings of fact must ask for the Case Stated to state a question whether a particular finding of fact is unjustified in view of the evidence adduced.

[6] Fourthly, findings of primary facts by the Special Commissioners cannot be questioned by the court as it does not sit as a review court of facts. The court's power is determine whether the conclusion reached by the Special Commissioners is consistent to the primary facts.

FINDINGS OF THE SPECIAL COMMISSIONERS

[7] At this juncture it is opportune that I reproduce the findings of the Special Commissioners:

> 9. We, the Special Commissioners of Income Tax, who heard the appeal, took time to consider our decision and gave it on 2 August 2006 for the following reasons:
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> (i) The objects as stated in the Memorandum and Articles of Association of a company by themselves are not conclusive. In the case of *Alf Properties Sdn Bhd v KPHDN* MSTC 4155, the Court of Appeal said at p 4, 162 'it is not safe for the Special Commissioners to come to the conclusion that the Appellant's principal activity is dealing in property merely on the ground that it is one of the stated objects of the Appellant as found in its Memorandum of Association. To come to a safe conclusion one has to go into the activities of the appellant whether in the past or in the present to find out whether the activities are one of the stated objects of the appellant.
>
> Also to come to correct conclusion we have to see what was the intention of the Appellant when they purchased the properties.
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> Lord Wilberforce in the House of Lords in the case of *Simmons (as liquidator) of Lionel Simmons Properties Ltd) v IRC* 53 TC461 at p 491 said 'Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing it at a profit, or was it acquired as a permanent investment?
>
> The appellant was established from the beginning not only to hold the investment in properties but also trading in log. This is supported by the accounts of the appellant which describe the purchased of 9 parcels of land as investment assets.
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> The accounting treatment and audited accounts provide relevant supporting evidence. Salmon LJ in the case of *Odeon Associated Theartres Ltd v Jones* 48 TC 257 said 'where... there is evidence which is accepted by the Court as established a sound commercial accounting practice conflicting with no statute, that normally is the end of the matter...

(ii) In the *Californian Copper Syndicate v Harris* 5 TC 169 it was found that the company was in its inception a company endeavouring to make profit by trade or business, and that the profitable sale of its property was not truly a substitution of one form of investment for another. Hence the gains were held to be taxable. Nevertheless, Lord Justice Clerk said at p 165 'It is quite a well settled principle.... that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit... assessable to Income Tax.

(iii) Trading requires an intention to trade and generally implies repetition and organization: However, the Appellant only had a single investment namely the 95 units of houses, and did not have any organization such as employees or special skills, or other 'commercial' characteristics, which would suggest that the Appellant intended to trade in properties as enunciated in the classic case of *Leeming v Jones* 15 TC 333.

(iv) The appellant contended that the unstable economic condition of the local and Asian financial crisis was the main reason for the disposal of the 94 units of houses. In this respect we quote the case of *Lionel Simmons Properties Ltd (In liquidation) and Othrs v CIR* 53 TC 461 where Lord Wilberforce said 'Frustration of a plan for investment, which compels realization, even if foreseen as a possibility, surely cannot give rise to an intention to trade

(v) Therefore the critical issue is whether the investment properties was an 'adventure in the nature of trade'undertaken for profit-making purposes. Based on the evidence available and analysis of the badges of trade as enunciated in the cases of *Leeming v Jones* 15 TC 333; *NYF Realty Sdn Bhd v CIR* [1974] 1 MLJ 182 and *Marson v Morton* [1986] STC 463 the investment properties shows that the investment cannot be said to bean 'adventure in the nature of trade.

On this point, we also quote the case of Turner v Last where it was said as follows: 'The fact that [the taxpayer] did resell Green Field very soon is obviously not conclusive [of the fact that the transaction was an adventure in the nature of trade]. A man may buy something, whether it be land or a chattel, for his own use and enjoyment with no idea of a quick resale, and then, quite unexpectedly, he may receive an offer to buy which is too tempting to refuse.

(vi) In the light of the above findings and the analyses of the key tax principles it clearly show:

(a) that the appellant's investment in properties were made as a long term investment.

(b) that the appellant was not at anytime trader in properties nor were the properties acquired as part of the appellant trade.

A (c) appellant's investment was not undertaken as an 'adventure in the nature of trade', for profit selling motive. Consequently, the gains or the sale of the properties would be a capital realization and not subject to income tax under the Income Tax Act 1967.

B Accordingly, we unanimously allow the appeal and order that the Notices of Assessments for relevant years be discharged accordingly.

[8] The above findings were based on the following facts admitted and proved which are as follows:

C 6. From the evidence both oral and documentary adduced before us, we find the following facts proved or admitted —

6.1 Facts Admitted

D (1) Taxpayer was incorporated on 21 May 1974

(2) Taxpayer is appealing against assessments made against it:

(i) Year of Assessment 1996 for RM360,670.80 in respect of the disposal of 6 units of industrial shophouses.

E (ii) Year of Assessment 1997 for RM172,023.60 in respect of the disposal of 2 units of industrial shophouses.

(iii) Year of Assessment 1998 for RM1,402,771.35 in respect of the disposal of 3 units of commercial shophouses & 2 units of F industrial shophouses and 38 units of residential houses. These 38 units of residential shophouses and 3 units of commercial shophouses were sold in one agreement dated 8 January 1997 to Hock Lee Construction Sdn Bhd for RM6,547,300.

G (iv) Year of Assessment 2000 for RM1,264,393.76 in respect of the disposal of 42 units of residential houses to Hock Lee Construction Sdn Bhd in one agreement dated 8 January 1999 for RM6,463,400.

(v) Year of Assessment 2000 (current year basis) for RM108,197.60 in H respect of disposal ofl unit of industrial shophouse.

6.2 Facts Proved:

(i) One of the objects of the appellant since its inception are inter alia to own or purchase or otherwise acquire for investment or resale, and to I traffic in lands, houses, building, plantations and immovable property of any tenure or any interest therein, any moveable property of any description or any interest therein, and to create, sell and deal in freehold and leasehold ground rents and generally to acquire, deal in, traffic by way of sale, lease, exchange or otherwise with property

of every description, whether immovable or moveable, real or personal and whether for valuable consideration or not. A

(ii) The appellant acquired 9 parcels of land in 1975 and 1979 for the purpose of investment. The land were the subject of the two development agreements between Hock Lee Holding Sdn Bhd ('HLH') (appellant) and Hock Lee Construction Sdn Bhd ('HLC'). The first development agreement dated 5 January 1983 and its supplementary agreement dated 31 May 1994 for the allocation of units. The second agreement dated 5 January 1995 and its supplementary agreement dated 27 December 1995 between HLH and other land owners and the developer HLC for allocation of units. B C

(iii) From the development agreements the appellant obtained 95 houses. These 95 houses were 'substituted investments' for the 9 parcels of land. These houses were intended to be held as rental properties.

(iv) The Minutes of Board of Director's dated 12 December 1981 at D11/81 states the following: The proposed housing development scheme. It is noted that the plan for the proposed housing development scheme for the following parcel of land has been forwarded to the Bintulu Development Authority for consideration and approved by the developer, Hock Lee Construction Sdn Bhd: D E

Land OT.850 17.48 acres

Land OT.6229 0.30 acres

Land OT.6228 L 70 acres F

Land OT.6227 1630 acres

Land OT.759 4.05 acres

Land OT.760 28.42 acres G

(v) HLH had further given a Power of Attorney to HLC on 5 January 1983 for 3 parcels of land situated at Sungai Marak Bintulu, Sarawak. HLH being the registered proprietors of 2 parcels of land and co-proprietors of 3 parcels of land and other owners had also given a Power of Attorney dated 3 July 1996 to Hock Peng Realty Sdn Bhd to enable Hock Peng Realty to deal with the properties which is part of the 9 parcels of land. H

(vi) HLH had also sold some of the units received by them to various parties beside HLC. All these properties were sold at market price. HLH had also sold some of its units to HLC via sale and purchase agreement dated 8 January 1997 and 8 January 1999 also at market price. I

(vii) The Board of Director Meeting dated 9 May 1997 states at D17/19 the following: 'Sale of Residential House. It was resolved to transfer all residential houses and industrial shophouses that are not intended to hold for investment to a wholly owned subsidiary at market price. ' Further Board of Director's meeting dated 12 May 1999 had stated at D22/99 that the 'Sale of landed properties held for investment'. It was resolved to approve the following transfer of landed properties not intended to hold for investment to wholly owned subsidiaries Hock Lee Construction Sdn Bhd 42 units landed properties as per Sales & Purchase Agreement dated 8 January 1999 RM6,463,400.

CONTENTIONS

[9] The appellant attacked the Special Commissioners' decision on four fronts which are:

(1) that the conclusion that the lands were acquired for long term investment was not supported by the facts and also inconsistent with the facts proved before them;

(2) that the findings that the respondent was not at any time a trader in properties and the lands acquired were not as part of the respondent's trade were inconsistent with the facts proved before them;

(3) that the finding that the respondent was not involved in an 'adventure in the nature of trade' in respect of the lands was wrong;

(4) that the fact that there was an economic downturn was not listed as a fact proved.

[10] Learned counsel for the respondent had, by his submission in reply, rebutted the appellant's attack point by point and in details which I will not reproduce here. Suffice for me to say that the crux of the contention of the learned counsel for the respondent was that the Special Commissioners had arrived at a decision which is wholly consistent with the primary facts.

FINDINGS OF THE COURT

[11] From the outset, it must be noted that this appeal is pursuant to para 34 schedule 5 of the Income Tax Act 1967 which states as follows:

34. Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to subparagraph 26(b) or (c)) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the

Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.

[12] What is before me can only be a question of law and that question is whether or not the findings of the Special Commissioners are consistent to the proved facts or what are known as 'primary facts' which in law cannot be questioned by this court unless challenged by the appellant in the Case Stated. Edgar Joseph Jr SCJ in *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 at p 735 puts it this way:

> True also it is that whether a taxpayer carries on a business is a question of fact but when, as here, there is a misdirection, it becomes a conclusion of law, (see *American Leaf Blending Sdn Bhd v DGIR* (1950 -1985) MSTC 33 at p 37; *Chu Lip Kong v DGIR* (1950-85) MSTC 58, 63, Privy Council).

[13] The question before me is of course whether the respondent was carrying a business of trade in respect of the lands. The relevant section in the Income.

[14] Tax Act is s 4 which reads as follows:

> 4. Classes of income on which tax is chargeable.
> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) gains or profits from a business, for whatever period of time carried on;
>
> (b) gains or profits from an employment;
>
> (c) dividends; interest or discounts;
>
> (d) rents, royalties or premium;
>
> (e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
>
> (f) gains or profits not falling under any of the foregoing paragraphs.

What then is a finding which is inconsistent with the primary facts? I can do no better than to refer to the following cases which illustrate such findings.

Chu Lip Kong v Director-General of Inland Revenue [1978] 2 MLJ 197

[15] The Special Commissioners found as primary facts the followings:

(1) the taxpayer purchased a piece of land for the sum of RM360,000 with the primary object of in due course exploiting the marketable timber standing on it;

(2) the land was virtually worthless for any other purpose, certain narrow gauge railway for access was constructed on it;

(3) no extraction of timbers was done during the two and half years in which the taxpayer was the leasehold owner; and

(4) the land was sold and transferred to one Chin Yin Khee for the sum of RM580,000, RM380,000 was payable immediately and RM200,000 by an identified cheque post dated six months and guaranteed by two directors of a timber company, Kim Hong & Co Ltd.

[16] Based the above facts, the Special Commissioners came to the conclusion that the sale to Chin Yin Kee was fictitious and not bona fide and that it was the taxpayers who sold the timbers to Kim Hong & Co Ltd. The Privy Council held such conclusion is one which no reasonable tribunal would come to and further that the Special Commissioners had no right to look behind the sale of the land to Chin Yee Kin as the Commissioner of Inland Revenue did not exercise his power to under s 26 of the Ordinance to disregard the transaction.

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri

[17] The Special Commissioners found as a fact that the primary purpose of the taxpayer in acquiring the land in February 1956 was to build houses for members, that is to say, for domestic purpose, through cooperative efforts, a finding which was amply justified by the evidence, then went on to misdirect themselves by making the wholly inconsistent finding that the acquisition of the land had never been treated or held as an investment and that, on the contrary, it had been held as stock in trade.

Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue [1986] 2 MLJ 161

[18] The Special Commissioners having found, inter alia, as a fact that capital had been raised to expand the hotel business, then went on to hold that transactions designed for this purpose had given rise to taxable income simply because something — namely, land and shares, — had been bought and sold at a profit. It was held by the Privy Council that in relation to the company reconstruction effected by the transfer of the benefit of the repurchase agreement and the exchange of the Merlin Shares for those in the hotel company, the Commissioner's decision was inconsistent with their finding that the taxpayer company's purpose was for further expansion of the business. The taxpayer's appeal, therefore, succeeded and the assessments discharged.

[19] Before I examine whether the decision of the Special Commissioners is consistent with the primary facts, I should look at how the cases have defined what amounts to a trading transaction as opposed to capital transaction. Edgar Joseph Jr SCJ in *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* had referred to several cases but suffice for me to refer to only *Simmons v IRC* [1980] 1 WLR 1186 where Lord Wilberforce said:

> One must ask, first, what the Commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of acquisition of the asset Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intention may be changed. What was an investment may be put into trading stock, and, I suppose vice versa. If findings of this kind is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax (*Inspector of Taxes v Wernher* (1956) ACCORDING 58, 36 TC 275). What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an intermediate status, neither trading stock nor permanent asset It must be one or other, even though and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit what is necessarily implicit in all commercial operations, namely that the situations are open to review.

[20] Having read with utmost care the Special Commissioners' reasoning for their conclusion, I am of the view that they are entirely justified to do so. The grounds for my view are these:

(1) The Special Commissioners found as a primary fact that the acquisition of the lands were for the purpose of investment. That being the case, the conclusion of the disposal of the 94 houses as a capital disposal is perfectly in order and consistent with the primary fact.

(2) In reaching their conclusion, they had dealt with all the proved facts and applied the correct and established principles of law by referring to the relevant cases.

(3) Their conclusion could not be faulted as they had taken into consideration of the respondent's activities such as what is stated in the Memorandum of Association, the intention of the respondent when it bought the lands, the accounting treatment of the purchase of the lands, no repetition of transaction in that the respondent only had a single

investment namely the 95 units of houses, the structure of the respondent's organization and the reason for the disposal of the 94 units of houses.

(4) The attack on the Special Commissioners' reliance on the unstable condition in the local and financial crisis for their conclusion is without merit. Firstly, if the appellant had wanted to challenge this reliance, they should have it as part of the Case Stated. Secondly, the fact that this consideration was not part of the facts proved is of no consequence. This court must assume that there had been evidence tendered before the Special Commissioners for them to state it as part of their reasons. If there was no such evidence then it is the duty of the appellant to produce to this court the relevant notes of evidence before the Special Commissioners. The use of this consideration in reaching their conclusion equates to a finding of fact which this court is not in a position to revise. Thirdly, the sale of the 94 houses due to unfavorable economic condition merely corroborates the conclusion that the lands were acquired as an investment.

(5) The contention that the evidence of AWl was hearsay would have merit if there were no other considerations for the Special Commissioners to reach their conclusion that the lands were acquired as investments. As stated earlier the Special Commissioners had taken into account all the activities of the respondent which corroborated AWl's evidence that the lands were acquired as investments.

(6) Finally, the appellant had not shown that the Special Commissioners had committed any error similar to what the Special Commissioners committed in the four cases I referred to earlier.

[21] Accordingly, I dismiss this appeal with costs to be taxed unless agreed to the respondent.

Appeal dismissed with costs to be taxed.

Reported by Brendan Navin Siva